

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LINDA M. MILLER**

Claimant

VS.

**RADHE, INC.**

Respondent

AND

**NATIONWIDE MUTUAL INSURANCE COMPANY**

Insurance Carrier

Docket No. 1,052,095

**ORDER**

Claimant appeals the October 14, 2010, Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders (ALJ). Claimant was denied benefits after the ALJ determined that claimant failed to provide timely notice of the accident and further failed to provide evidence that just cause existed to extend the notice time limit to 75 days.

Linda M. Miller, claimant, appeared pro se. Respondent and its insurance carrier appeared by their attorney, Mirko Bolanovich of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held October 12, 2010, with attachments, and the documents filed of record in this matter.

**ISSUES**

1. Did claimant provide timely notice of the accident? Claimant contends that she discussed her accident with both the owner and the owner's wife on the date of the accident or the next day. Respondent contends that notice of the May 15, 2010, accident did not occur until claimant delivered a letter to respondent on June 27, 2010.
2. If claimant failed to provide timely notice of the accident, was there just cause for this failure sufficient to allow the time for giving notice to be extended to 75 days?

### **FINDINGS OF FACT**

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Hearing Order should be affirmed. Claimant worked for respondent as a night auditor and front desk clerk. Claimant testified that she began working for respondent in March 2010. Respondent's wage evidence indicates that claimant did not begin working until April 28, 2010.

Claimant testified that on May 15, 2010, she was working on the juice machine. This required that she climb a stepladder. As claimant was coming down the ladder, she injured her left ankle. Claimant contends that she told Panna Sandir (a.k.a. Pria), general manager for respondent, and the wife of Divyang Sandir (a.k.a. David), the owner of respondent, of the accident either that day or the next day. Claimant alleges that she and Pria had several conversations about the accident. However, claimant acknowledges that she did not request medical treatment at that time.

Pria testified that she was not told of the alleged accident until claimant placed a letter under her door on June 27, 2010. She denies having any conversations with claimant about the alleged accident until that date, or later. Pria did note that claimant had problems with her left ankle, but was advised by claimant that she injured herself at home doing laundry.

Claimant sought treatment at the Stormont-Vail Health Care emergency room (ER) on May 17, 2010. At that time, claimant reported a fall from a ladder with an injury to her left ankle. The location of the fall is not in the record. Claimant was again examined at the ER on May 25, 2010. She reported twisting her left ankle, with no added history. Claimant testified that she placed a piece of paper, requesting workers compensation information, under Pria's door sometime after her second ER visit. Pria denied receiving anything from claimant in writing until the June 27 document. Claimant did not keep a copy of the document she alleges was placed under Pria's door, and no such document is contained in this record.

David also testified in this matter. He also denied having any information regarding the alleged accident until the letter of June 27, 2010, was placed under Pria's door. The matter was then transferred to respondent's insurance company.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

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<sup>1</sup> K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>2</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>3</sup>

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.<sup>4</sup>

By statute, claimant had 10 days within which to advise respondent of this accident. Claimant testified to multiple contacts with respondent's general manager and its owner. However, both the owner and general manager have testified to the contrary. Additionally, the paper that claimant alleges she slipped under Pria's door is nowhere to be found. Claimant did not keep a copy, and Pria denies the document was ever presented.

In this instance, the decision hinges on the credibility of the witnesses. Here, the ALJ denied claimant's request for benefits, finding that claimant had failed to prove that notice was given in a timely fashion. All three witnesses testified in the presence of the ALJ. Apparently, the ALJ found respondent's owner and general manager to be more credible than claimant. The Board has, at times, given some deference to the determination of the administrative law judge in matters of credibility of witnesses. Here, the ALJ apparently found claimant's testimony to be lacking. This Board Member agrees. Claimant has provided no evidence of notice to respondent of the accident before June 27, 2010. That date is well past the allowed 10-day notice period. The denial of benefits, because of claimant's failure to timely notify respondent of the accident, is affirmed.

Claimant has also raised the issue of just cause under K.S.A. 44-520. However, there is no evidence to justify a finding that claimant's failure to timely notify respondent of this accident was justified. In fact, claimant consistently contends that she did provide timely notice of the accident. As there is no support to find that there was just cause for claimant's failure to timely notify respondent of the accident, the time limit for providing timely notice cannot be extended. The denial of benefits in this matter is affirmed.

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<sup>2</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>3</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>4</sup> K.S.A. 44-520.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>5</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

Claimant failed to provide timely notice of the accident. There is no evidence in this record to find that the failure of claimant was justified. Therefore, claimant has not met the requirements of K.S.A. 44-520 and the denial of benefits is affirmed.

### **DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders dated October 14, 2010, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2010.

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HONORABLE GARY M. KORTE

c: Linda M. Miller, pro se claimant, 825 Sunrise Drive, Emporia, KS 66801  
Mirko Bolanovich, Attorney for Respondent and its Insurance Carrier  
Rebecca Sanders, Administrative Law Judge

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<sup>5</sup> K.S.A. 44-534a.